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16
17 **UNITED STATES DISTRICT COURT**
18 **CENTRAL DISTRICT OF CALIFORNIA**
19

20 *IN RE SUBPOENA TO ZYXEL*
21 *COMMUNICATIONS, INC.*

22 Served in case:
23 *TQ Delta, LLC v. Commscope Holding*
Company, Inc., Commscope Inc., Arris
24 *International Limited, Arris Global*
Ltd., Arris US Holdings, Inc., Arris
25 *Solutions, Inc., Arris Technology, Inc.,*
and Arris Enterprises, LLC, No. 2:21-
26 *cv-310-JRG (E.D. Tex.) (Lead Case),*

27 *Nokia Corp., Nokia Solutions and*
Networks Oy, and Nokia of America
28 *Corp., No. 2:21-cv-309-JRG (E.D.*

Misc. Case No. 2:22-mc-168

**NOKIA'S NOTICE OF MOTION AND
MOTION TO COMPEL OUT-OF-
DISTRICT SUBPOENAS AGAINST
ZYXEL COMMUNICATIONS, INC.**

1 Tex.) (Member Case).

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1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that, as soon as counsel may be heard before the
3 assigned Judge at the assigned time in the assigned department, Defendants Nokia
4 Corp., Nokia Solutions and Networks Oy, and Nokia of America Corp. (collectively
5 “Nokia”) will and hereby do move to compel and enforce subpoenas served on non-
6 party ZyXEL Communications, Inc. (“ZCI”) on January 3, 2022. Pursuant to Rule 45(d)
7 of the Federal Rules of Civil Procedure, Nokia brings this motion in this Court because
8 the recipient of the subpoenas, ZCI, resides in this District and compliance is required
9 here.

10 This motion is based on this Notice, the Memorandum of Points and Authorities,
11 the Declaration of Katherine Rubschlager, all attached exhibits submitted concurrently
12 herewith, all subsequent oral or other arguments, and any matters this Court may or must
13 judicially notice.

14 Nokia is the defendant in an action currently pending in the U.S. District Court
15 for the Eastern District of Texas, styled *TQ Delta, LLC v. Nokia Corp., Nokia Solutions*
16 *and Networks Oy, and Nokia of America Corp.*, No. 2:21-cv-309-JRG (E.D. Tex. filed
17 Aug. 13, 2021) (Member Case), where TQ Delta, LLC has alleged patent infringement
18 against Nokia.

19 On January 3, 2022, Nokia served on ZCI a subpoena *duces tecum* and a
20 subpoena *ad testificandum* seeking evidence for use in the Texas action. Pursuant to
21 Local Rule 37-2, the requests relevant to this motion are attached to the Declaration of
22 Katherine Rubschlager as Exhibit A.

23 Nokia’s accompanying Memorandum of Points and Authorities details the basis
24 for Nokia’s contention that it is entitled to the requested discovery and how the
25 proportionality and other requirements of Rule 26(b)(2) of the Federal Rules of Civil
26 Procedure are satisfied.

27 Nokia respectfully asks this Court to grant Nokia’s motion to compel, order ZCI
28 to comply with the subpoena *duces tecum* and produce all documents responsive to

Document Request Nos. 1–11 within five business days of the Court’s order, and order ZCI to comply with the subpoena *ad testificandum* and provide a witness to testify on Deposition Topics 1–12 within 10 business days of the Court’s order.

Dated: August 19, 2022

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2 257 F.R.D. 215 (C.D. Cal. 2009).....5
3 *Truswal Sys. Corp. v. Hydro-Air Eng’g, Inc.*,
4 813 F.2d 1207 (Fed. Cir. 1987)5
5 *WPIX Inc. v. Broad. Music, Inc.*,
6 No. CV-11-4052-SJO2011, 2011 U.S. Dist. LEXIS 154908 (C.D. Cal.
7 July 5, 2011)5

7 **Other Authorities**

8 Fed. R. Civ. P. 26(b)5, 7
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I. INTRODUCTION

Defendants Nokia Corp., Nokia Solutions and Networks Oy, and Nokia of America Corp. (collectively “Nokia”) respectfully move this Court for an order compelling ZyXEL Communications, Inc. (“ZCI”) to comply with a Rule 45 subpoena *duces tecum* and subpoena *ad testificandum* served on ZCI on January 3, 2022. The requested documents and deposition are directly relevant to the claims asserted against Nokia by TQ Delta, LLC (“TQ Delta”) in the U.S. District Court for the Eastern District of Texas (*TQ Delta, LLC v. Nokia Corp., et al.*, No. 2:21-cv-309) (the “Texas Action”). Nokia has requested documents and deposition testimony indicating the U.S. and non-U.S. sales of all ZCI products licensed under an agreement between ZCI and TQ Delta—namely, ZCI’s DSL CPE products and DSL Port Equipment (as defined in the subpoenas). Although the information appears to be readily available to ZCI, ZCI has refused to provide *any* documents or deposition testimony pursuant to the subpoenas. The U.S. and non-U.S. sales information, and deposition testimony regarding that information, are necessary so that Nokia can perform a complete and accurate reasonable-royalty analysis for those licensed products. This information is highly relevant to the Texas Action, and it is unquestionably within ZCI’s possession, custody, or control. Nokia therefore respectfully requests that the Court grant the motion to compel and order ZCI to comply with the subpoenas.

II. STATEMENT OF FACTS

A. Background

On August 13, 2021, TQ Delta sued Nokia in the Eastern District of Texas alleging that Nokia infringes 19 patents¹ by making, using, selling, offering for sale, and/or importing customer premise equipment (“CPE”) and central office equipment (“CO”) products for use with digital subscriber line (“DSL”) technology (“the DSL Products”). (*See* Dkt. No. 1, Original Complaint ¶¶ 2, 24, 29-30.)

¹ Specifically, U.S. Patent Nos. 7,570,686; 7,844,882; 8,090,008; 8,468,411; 8,495,473; 8,594,162; 8,595,577; 8,937,988; 9,014,193; 9,094,348; 9,154,354; 9,300,601; 9,485,055; 9,547,608; 9,894,014; 10,044,473; 10,409,510; 10,567,112; and 10,833,809 (collectively, the “Asserted Patents”).

1 ZCI is well aware of TQ Delta and the Asserted Patents. Indeed, ZCI was a party
2 to a previous litigation—styled *TQ Delta, LLC v. ZyXEL Communications, Inc.*, No.
3 13-cv-02013-RGA (D. Del. filed Dec. 9, 2013) (“the Delaware Action”)—that
4 involved TQ Delta and many of the same patents at issue in the Texas Action. TQ Delta
5 and ZCI ultimately settled the Delaware Action through a Settlement and Patent
6 License Agreement, and the parties dismissed their respective claims. In connection
7 with the resolution of that case, TQ Delta licensed its patents (including the Asserted
8 Patents) to ZCI in December 2019.

9 TQ Delta identified ZCI to Nokia during discovery in the Texas Action.
10 Specifically, on December 9, 2021, Nokia served discovery requests on TQ Delta
11 seeking documents and deposition testimony identifying each entity authorized or
12 licensed to practice any of the claims of the Asserted Patents, or to make, use, sell,
13 offer to sell, or import into the United States a product that practices, or is alleged by
14 TQ Delta to practice, any claim of the Asserted Patents. (Exhibit B.) In response, TQ
15 Delta produced a Patent Settlement and License Agreement, dated December 27, 2019,
16 between TQ Delta and ZCI (through its parent company, ZyXEL Communications
17 Corp.). (Exhibit C.) In that agreement, TQ Delta granted ZCI “an irrevocable
18 worldwide, non-exclusive, non-assignable, non-sublicensable license” to the
19 “Licensed Patents.” (*Id.*). The “Licensed Patents” include “any patents and patent
20 applications owned by [TQ Delta] or for which it has the right to grant licenses as of
21 the Effective Date, including all of those identified in Exhibit E [to the agreement]; and
22 . . . any and all patents and patent applications, worldwide, that are owned by TQ Delta
23 or for which it has the right to grant licenses.” (*Id.* at 3). Accordingly, the Licensed
24 Patents include the Asserted Patents involved in the Texas Action.

25 The agreement also included several exhibits that are particularly relevant to this
26 motion. For instance, Exhibit A to the agreement details the actual and estimated
27 quantities of “Non-Lantiq DSL CPE and DSL Port Equipment sold by [ZCI] from
28 2014–2019,” and estimates the quantities to be sold “from 2020 through the end of the

License term.” (*Id.* at 6). Exhibit B to the agreement details the sum of “the quantities of Non-Lantiq DSL CPE and DSL Port Equipment actually sold in the United States . . . from January 1, 2014, through September 31, 2019,” and “Licensee’s reasonable estimate of the quantities . . . to be sold in the United States . . . from October 1, 2019, through December 31, 2019.” (*Id.* at 9). Exhibit B also includes “Licensee’s reasonable estimate of the quantities of Non-Lantiq DSL CPE and DSL Port Equipment sold and to be sold [outside the U.S.] from January 1, 2014, though December 31, 2019.” (*Id.*). Exhibit C to the agreement details “Licensee’s reasonable estimate of the quantities of Non-Lantiq DSL CPE and DSL Port Equipment to be sold in the Patent Territories . . . from January 2, 2020, through the end of the License Term.” (*Id.* at 9–10).

Because ZCI has this information, Nokia issued a subpoena *duces tecum* and subpoena *ad testificandum* to ZCI on January 3, 2022. (Exhibit A). The subpoena *duces tecum* includes eleven document requests, and the subpoena *ad testificandum* includes twelve deposition topics, all of which are directed to the purchasing and licensing of the Asserted Patents between ZCI and TQ Delta and the corresponding sales information from ZCI. As an example, the requests sought ZCI’s U.S. and non-U.S. sales information from December 9, 2007 to the present for DSL Products and any ZCI “Licensed Product” under the Settlement and Patent Licensing Agreement:

Document Request No. 7:

The U.S. and non-U.S. sales (in units, ports, and revenue) of any ZyXEL “Licensed Product” under the Settlement and Patent License Agreement between TQ Delta and ZyXEL.

Document Request No. 8:

The U.S. and non-U.S. sales (in units, ports, and revenue) of any ZyXEL “DSL CPE” and “DSL Port Equipment” product from December 9, 2007 to the present.

1
2 To date, ZCI has failed to provide any documents, or to agree to provide any
3 testimony, regarding sales of ZCI products licensed under the agreement with TQ Delta.
4 Instead, ZCI has responded with boilerplate objections, and ZCI has attempted to justify
5 its lack of a substantive response by asserting that “ZCI is not a signatory to a Settlement
6 and Patent License Agreement with TQ Delta, LLC.” (Exhibit D at 11).

7 On January 19, 2022, Nokia raised its concerns regarding ZCI’s failure to provide
8 a sufficient response to the subpoenas and requested ZCI’s availability to meet and
9 confer. Nokia stated that it may need to proceed with filing a motion to compel if ZCI
10 refused to respond. ZCI replied by rehashing its same objections and raising a conflict-
11 of-interest argument in light of Alston & Bird’s former representation of ZCI in the
12 Delaware matter.²

13 Nokia’s local counsel thereafter met and conferred with counsel for ZCI to
14 reiterate Nokia’s requests for ZCI’s sales information. (Rubschlager Decl., ¶ 6). After
15 that meeting, Nokia’s local counsel attempted to contact ZCI on numerous occasions in
16 an attempt to reach an agreement. (*Id.*) ZCI ignored all of those requests. (*Id.*) ZCI thus
17 apparently maintains its refusal to produce any documents or deposition testimony
18 responsive to the subpoenas, despite having the requested sales information readily
19 available.

20 **III. ARGUMENT**

21 ZCI’s failure to provide responsive documents and testimony pursuant to the duly
22 issued subpoenas is unreasonable and unsupported in the law, particularly since the
23 requested discovery is narrowly tailored and not overly burdensome.

24 **A. Legal Standards**

25 Rule 26(b) provides that a party “may obtain discovery regarding any
26 nonprivileged matter that is relevant to any party’s claim or defense and proportional
27

28 ² Alston & Bird disagrees that any conflict exists based on its prior representation of ZCI. Alston & Bird no longer represents ZCI in any capacity.

1 to the needs of the case.” Fed. R. Civ. P. 26(b)(1). “The scope of discovery that can be
 2 obtained by a subpoena under Rule 45 is the same as the scope under Rule 26(b).” *E.g.*,
 3 *Epistar Corp. v. Lowes Cos.*, No. CV-17-3219-JAK, 2018 U.S. Dist. LEXIS 228810,
 4 at *5 (C.D. Cal. Feb. 26, 2018). Relevant information need not be admissible to be
 5 discoverable, Fed. R. Civ. P. 26(b)(1), and courts generally recognize that relevancy
 6 for purposes of discovery is broader than relevancy for purposes of trial. *See Monster*
 7 *Energy Co. v. Vital Pharms., Inc.*, No. 5:18-cv-01882-JGB, 2021 U.S. Dist. LEXIS
 8 67934, at *7 (C.D. Cal. Feb. 22, 2021) (citing *Nguyen v. Lotus by Johnny Dung Inc.*,
 9 No. 8:17-cv-01317-JVS, 2019 U.S. Dist. LEXIS 122787, at *3 (C.D. Cal. June 5,
 10 2019)). The party moving to compel discovery bears the burden of establishing that the
 11 information sought is relevant under Rule 26(b)(1). *In re Allergan, Inc. Sec. Litig.*, No.
 12 14-cv-02004-DOC, 2016 U.S. Dist. LEXIS 195726, at *9-10 (C.D. Cal. Sept. 27,
 13 2016). “But, ultimately, ‘[t]he party who resists discovery has the burden to show
 14 discovery should not be allowed, and has the burden of clarifying, explaining, and
 15 supporting its objections.’” *Id.* at *10 (quoting *Superior Commc’ns v. Earhugger, Inc.*,
 16 257 F.R.D. 215, 217 (C.D. Cal. 2009)).

17 In the context of a third-party subpoena, a district court that has no connection
 18 to the underlying case “should be ‘especially hesitant to pass judgment on what
 19 constitutes relevant evidence thereunder.’ Where relevance is in doubt . . . the court
 20 should be permissive.” *WPIX Inc. v. Broad. Music, Inc.*, No. CV-11-4052-SJO2011,
 21 2011 U.S. Dist. LEXIS 154908, at *5 (C.D. Cal. July 5, 2011) (quoting *Truswal Sys.*
 22 *Corp. v. Hydro-Air Eng’g, Inc.*, 813 F.2d 1207, 1212 (Fed. Cir. 1987)).

23 **B. The Discovery Sought Is Relevant to the Texas Action.**

24 Nokia’s request for U.S. and non-U.S. sales information of ZCI’s DSL Products
 25 by SKU is unquestionably relevant to the Texas Action. *See Polaris Innovations, Ltd.*
 26 *v. Kingston Tech. Co.*, No. 8:16-cv-00300-CJC, 2017 U.S. Dist. LEXIS 222261, at *13
 27 (C.D. Cal. Feb. 14, 2017), Dkt. No. 153 (granting motion to compel and stating that,
 28 “as a general matter, worldwide sales information is relevant to . . . reasonable royalty

1 calculations”); *Carnegie Mellon Univ. v. Marvell Tech. Group, Ltd.*, 807 F.3d 1283,
2 1304 (Fed. Cir. 2015) (stating that in a reasonable royalty analysis, “[p]ast licensing
3 practices of the parties and licenses for similar technology in the industry may be useful
4 evidence”); *Ericsson, Inc. v. D-Link Sys.*, 773 F.3d 1201, 1227 (Fed. Cir. 2014) (finding
5 that “royalties received by the patentee for the licensing of the patent in suit” is a
6 relevant factor) (citing *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp.
7 1116, 1120 (S.D.N.Y. 1970)).

8 TQ Delta and ZCI (a subsidiary of ZyXEL Communications Corp.) have a
9 worldwide license agreement covering the Asserted Patents. Further, ZCI sold the
10 products licensed under that agreement both in the United States and internationally.
11 Accordingly, for Nokia to determine the reasonable royalty rate for the products covered
12 by that license agreement, Nokia needs discovery of ZCI’s U.S. and non-U.S. product
13 sales. Moreover, to properly determine which covered products were sold, and the
14 number of covered products that were sold, Nokia additionally needs the total units sold
15 by SKU. Without the complete sales information, Nokia cannot possibly perform an
16 accurate reasonable royalty analysis. *See Evs Codec Techs. v. Oneplus Tech. Shenzhen*
17 *Co.*, No. 2:19-CV-00057-JRG, 2020 U.S. Dist. LEXIS 204027, at *5 (E.D. Tex. Apr.
18 9, 2020) (citing *3Com Corp v. D-Link Sys.*, No. 3:03-cv-02177-VRW, 2007 U.S. Dist.
19 LEXIS 26540, at *9 (N.D. Cal. Mar. 27, 2007), Dkt. No. 391 (granting motion to
20 compel worldwide sales information because “worldwide sales information is relevant
21 to . . . reasonable royalty calculations” and “could be indicative of a ‘ceiling amount for
22 a reasonable royalty’”). There is thus no question that ZCI’s sales information of the
23 same DSL products covered under the Settlement and Patent License Agreement
24 between TQ Delta and ZCI are highly relevant to Nokia’s reasonable royalty analysis
25 in the Texas Action.

C. The Discovery Sought Is Limited in Scope, Not Burdensome, and Readily Available to ZCI.

The sales information sought by Nokia’s subpoenas is narrowly tailored. The Federal Rules expressly permit discovery of “any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.” Fed. R. Civ. P. 26(b)(1). As shown above, there is no question that ZCI’s sales information for its DSL Products is highly relevant to Nokia’s reasonable royalty analysis for the Asserted Patents. ZCI’s assertion that the requests are not “narrowly or otherwise properly tailored to lead to the discovery of admissible evidence” misses the mark. First, “[i]nformation within th[e] scope of discovery [afforded by Rule 26(b)(1)] need not be admissible in evidence to be discoverable.” Fed. R. Civ. P. 26(b). Second, it is highly likely that the requested discovery will constitute or at least lead to the discovery of admissible evidence, as the worldwide sales will help determine the reasonable royalty rate for a comparable license. *See, e.g., 3Com Corp v. D-Link Sys.*, No. 3:03-cv-02177-VRW, 2007 U.S. Dist. LEXIS 26540, at *9 (N.D. Cal. Mar. 27, 2007) (ordering production of worldwide sales where “worldwide sales [we]re reasonably calculated to lead to the discovery of admissible evidence” and were related to a party’s reasonable royalty calculation).

ZCI also cannot hide behind its parent corporation (ZyXEL Communications Corporation) on the basis that “ZCI is not a signatory to a Settlement and Patent License Agreement with TQ Delta, LLC.” (Exhibit D at 11). ZCI itself was a party to the Delaware Action that resulted in execution of the Settlement and Patent License Agreement with TQ Delta. Indeed, the Settlement and Patent License Agreement was predicated on TQ Delta dismissing the case against ZCI, and the agreement expressly identified ZCI as a “Party” to the agreement. For example, the Agreement states that “IT IS HEREBY STIPULATED by Plaintiff TQ Delta, LLC and Defendants ZyXEL Communications, Inc. and ZyXEL Communications Corporation (together, the

1 “Parties”), . . . and further to an executed settlement and patent license agreement
2 *between the Parties,*” that all claims would be dismissed. (Exhibit C at 14 (emphasis
3 added)). ZCI was thus a party to the agreement and can reasonably provide sales data
4 relevant to that agreement.

5 Additionally, it is not unduly burdensome for ZCI to provide worldwide sales
6 information, and ZCI cannot credibly claim to be burdened by doing so. There is no
7 dispute that ZCI maintains sales data for its DSL Products. ZCI has not shown (and
8 cannot reasonably show) that the requested information would be unduly burdensome
9 or costly to produce in response to the subpoenas, or that the information is equally
10 available from other sources. Rather, the sales information sought is readily obtainable
11 from ZCI, and ZCI is the party that can provide it. Indeed, ZCI clearly has the means to
12 provide the requested sales information since it has *already produced* particular U.S.
13 and non-U.S. sales information in connection with Exhibits A, B, and C to the
14 agreement. Further, as ZCI was a party to the litigation involving TQ Delta, and was a
15 “Party” to the agreement, ZCI is in the best position to provide the requested documents
16 related to that litigation. Moreover, for certain of the requested discovery, such as
17 information related to any marking of any ZCI article, ZCI is likely the *only* party that
18 has the knowledge and documents responsive to those requests.

19 As shown, the requested discovery is highly pertinent to issues asserted against
20 Nokia in the Texas Action, and ZCI would bear minimal, if any, burden by producing
21 worldwide sales information by SKU and other responsive documents already within
22 its possession, custody, or control, and providing a deposition regarding those topics.³

23 **IV. CONCLUSION**

24 There is no dispute that ZCI has information that is directly relevant to Nokia’s
25 reasonable royalty analysis in the Texas Action. The information is readily available to
26

27 ³ Any concern that ZCI may have regarding confidentiality is quelled by the Protective Order issued
28 in the Texas Action. *See TQ Delta, LLC v. Commscope Holding Company, Inc.*, No. 2:21-cv-310-JRG
(E.D. Tex.) (Lead Case), Dkt. No. 61 (“Protective Order”). The information can be provided pursuant
to the Protective Order.

1 ZCI, and ZCI has no basis for its refusal to produce this discoverable information in
2 response to the duly issued subpoenas. Nokia respectfully requests that this Court grant
3 its motion and compel ZCI to comply with the subpoenas.

4
5 Dated: August 19, 2022

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